80-892

No. .....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GAF CORPORATION,

Petitioner,

VS.

JAMES K. J. CHENG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December, 1980

Questions Presented

I.

Whether the Court of Appeals for the Second Circuit erred in holding that an entire multi-department law firm should be disqualified from defending a client in an action because it employs as an associate an attorney who previously worked for a legal services organization which represents the plaintiff in that action, where the law firm began defending the action substantially prior to hiring the attorney, where that attorney had no direct involvement with the action or the plaintiff while at the legal services organization, and where the attorney has been completely screened away from any involvement in the action while at the law firm and assigned to a department of the firm wholly removed and distinct from the department in charge of defending the action.

II.

Whether the Court of Appeals for the Second Circuit erred in deciding the merits of this case[1] when that court, sitting *en banc* in *Armstrong* v. *McAlpin*, held two months earlier that orders denying motions to disqualify counsel were not immediately appealable.

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[1] The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals for the Second Circuit.

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No. .....

GAF CORPORATION,

Petitioner,

vs.

JAMES K. J. CHENG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner GAF Corporation ("GAF") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on August 26, 1980.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unofficially reported at 23 Fair Empl. Prac. Cas. 1576 and is set forth at Appendix A herein. The opinion of the District Court for the Southern District of New York, dated March 14, 1980, is not reported and is set forth at Appendix B herein.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 26, 1980. Petitioner filed a timely motion for rehearing, which was denied on October 27, 1980. This petition for a writ of certiorari was filed within ninety (90) days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Code of Professional Responsibility Provisions Involved

Canon 4 of the ABA Code of Professional Responsibility ("Code") states: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

Canon 5 of the Code states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

Canon 9 of the Code states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Disciplinary Rule 5-105(D) of the Code states: "If a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

Statement of the Case

From October 1974 until October 1979, Philip M. Gassel ("Gassel") was employed as an attorney by Legal Services for the Elderly Poor[2] ("LSEP"), attorneys for respondent James K. J. Cheng ("Cheng"). LSEP was at all relevant times a state and federally funded legal services organization specializing in legal problems of the elderly. During the period of Gassel's employment, LSEP employed from four to six attorneys, assisted by several part-time law students.

On June 29, 1977, Cheng commenced this action, invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1343, and alleged that GAF violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. While at LSEP, as Cheng's counsel has contended herein, Gassel was present at certain "informal" discussions with various LSEP staff regarding, among other things, the conduct of any number of LSEP cases of which Cheng's case was one, and was exposed to unspecified confidential information. However, as conceded by Cheng's counsel, at no time did Gassel represent Cheng in any capacity. He undertook no research, prepared no pleadings, motion papers, memoranda or correspondence of any kind, nor did Gassel ever confer with Cheng with regard to the prosecution of this case.

The firm of Epstein Becker Borsody & Green[3] (the "Epstein Firm") hired Gassel as a senior associate in October 1979 for its health law department because of his expertise

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[2] Legal Services for the Elderly Poor became Legal Services for the Elderly on May 1, 1980.

[3] Epstein Becker Borsody & Green became Epstein Becker Borsody & Green, P.C. on July 1, 1980.

in that substantive area. At that time, this action had been pending over two years. The defense of the case was originally undertaken by Ronald Michael Green, then a member of another law firm, who, upon joining the Epstein Firm in August 1978, continued supervising GAF's defense as head of the Epstein Firm's labor law department. This case, as it is an employment discrimination matter, was initially assigned to the Epstein Firm's labor law department, which has handled it exclusively to this date. When Gassel was first employed, the Epstein Firm had some thirty-five attorneys, with New York City and Washington, D.C. offices.[4] At all relevant times, the Epstein Firm has had only two major areas of specialization, labor law and health law. Attorneys are permanently assigned to one of these two areas of specialization on a full-time basis due to the high degree of substantive expertise necessary to adequately represent clients in those areas. Staff meetings are held separately for each specialty. Gassel was assigned to the health law department at the commencement of his employment with the Epstein Firm and has remained continuously with that department.

Since the inception of Gassel's employment, the Epstein Firm has maintained a "Chinese Wall" between him and this case. Gassel has had no involvement with this case whatsoever, other than filing factual affidavits with the District Court solely with regard to Cheng's disqualification motion, and has not been privy to any discussions regarding the merits, defenses, tactics or strategies of the case. He is not permitted to work on the case. Gassel has divulged no confidential information to the Epstein Firm, has never been requested to do so, nor would he do

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[4] The Epstein Firm has now grown to nearly sixty attorneys and added an office in Fort Worth, Texas.

so. Cheng and his counsel have considered Gassel's integrity above suspicion.

On January 25, 1980, Cheng moved to disqualify the entire Epstein Firm on the grounds that its continued participation in the action violated the ABA Code of Professional Responsibility. On March 14, 1980, the District Court for the Southern District of New York denied the motion, concluding that under the circumstances presented, disqualification "would not serve any interest which the law recognizes." (A-18).[5] At the time the motion was decided, substantial discovery over a period of approximately two years, including numerous depositions, interrogatories and document requests, as well as extensive legal research and other pre-trial preparation, had been completed and GAF had already incurred the attendant and considerable legal expenses.

On August 26, 1980, the Court of Appeals for the Second Circuit reversed the decision of the District Court, finding that, despite the Epstein Firm's screening procedures, it was "unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation." (A-11). The case was remanded to the District Court for entry of an order of disqualification.

[5] Refers to page number of Appendix.

REASONS FOR GRANTING THE WRIT

I.

This Case Presents Issues of Importance to the Entire Legal Profession.

All lawyers function in a system filled with ethical constraints, many of which are hard to apply and capable of generating significant debate. The courts are frequently placed in the difficult position of having to interpret these ethical constraints. The resulting rulings affect both attorneys and their clients. The issues presented in this case have particularly far-reaching impact on the mobility of attorneys, especially those who wish to devote, or who have devoted, any portion of their time or careers to the public interest, and the ability of litigants to freely choose their counsel.

The question of whether a law firm must be disqualified from a case in which it has a substantial and long-standing commitment because of the necessity for disqualification of a former legal services attorney now employed by the firm, who has been effectively screened from the case, is closely akin to the same question involving a government attorney. The former government attorney issue has attracted a great deal of attention. In *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), the Court of Appeals for the Second Circuit addressed the issue of screening procedures as a method of avoiding law firm disqualification. On the rehearing *en banc* of the Second Circuit's earlier panel decision, 606 F.2d 28 (2d Cir. 1979), the court received seven *amici curiae* briefs, all attesting to the importance of the issues raised on appeal, and stated that a decision rejecting the efficacy of screening "may have significant adverse consequences." 625 F.2d at 443. These con-

sequences, in the words of the court, could take the following forms:

> "Thus, such disapproval may hamper the government's efforts to hire qualified attorneys; the latter may fear that government service will transform them into legal 'Typhoid Marys,' [footnote omitted] shunned by prospective employers because hiring them may result in the disqualification of an entire firm in a possibly wide range of cases."

Id. at 443. *See also Central Milk Producers Cooperative* v. *Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978); *Kesselhaut* v. *United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam).

The legal services bar, like that of government service, is a significant sector of the legal profession, involving thousands of attorneys. For example, the Legal Services Corporation, established by Congress in 1974, funded programs (such as LSEP) staffed with over five thousand attorneys as of the end of fiscal year 1979. For fiscal year 1980, the Legal Services Corporation received an appropriation of three hundred million dollars. Legal Services Corporation Annual Report 1979, at 8, 44. Every state and virtually every city has a public interest law organization or bar association actively involved in *pro bono* work. The number of attorneys in the private practice of law who may from time to time volunteer their services to the public interest is impossible to calculate but is clearly substantial.

Legal services attorneys frequently follow a career path like that of government attorneys, often going into private practice after a period of public service to the disadvantaged. While in public service, legal services attorneys, like their counterparts in government service, often de-

velop expertise in particular areas of law. Furthermore, like government attorneys, legal services attorneys often work on broad, "issue oriented" matters, which have significance to numerous parties, affect the administration of various statutory schemes, and have broad impact on segments of the economy. So too, private law firms, many times responding to the call of local bar associations, volunteer their attorneys for *pro bono* work under the auspices of legal services organizations.[6] New associates with law firms frequently request such license when beginning their employment.

The consequences which would flow from disqualifications of government attorneys are the same with regard to legal services attorneys. Lawyers, law firms and clients, when faced with uncertainty as to the efficacy of screening, will seek to avoid the risk by disassociating themselves from those who create the risk.[7] Lawyers or law firms with numerous clients and ongoing matters will surely be reluctant to do *pro bono* work for legal services organizations when, if the Second Circuit's disqualification test set out in this case is used, disqualification could result from mere casual and informal chatter between lawyers about even unidentified cases or abstract legal theories, particularly when the case inventories of the legal services organization and the opposing law firm are not and could not reasonably be known to the entire assemblage of attorneys. Such circumstances will have a significant effect on legal services

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[6] Indeed in this case, Cheng's brief to the Court of Appeals for the Second Circuit was written with the assistance of an attorney on leave from a large, prestigious New York City law firm to work with LSEP for several months.

[7] Those who hire or retain attorneys will be especially wary when apprised of the unfortunate experiences of Gassel and the Epstein Firm. In litigation unrelated to this case, the law firm is presently the target of yet another request for disqualification based on Gassel's prior association with LSEP.

organizations, on clients, and on the mobility of untold thousands of attorneys.

This Court has accepted review of a decision dealing with matters of the immediate appealability of orders denying disqualification motions and the merits of such motions. *See Firestone Tire & Rubber Co.* v. *Risjord,* No. 79-1420, presently *sub judice.* Similarly, the issues presented in this case have wide ranging significance and merit review.

II.

The Decision of the Court of Appeals Conflicts With the Rationale of Its Prior *Armstrong* v. *McAlpin* Decision.

In *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d Cir. 1980), the Court of Appeals for the Second Circuit, sitting *en banc,* adopted a "restrained" approach towards attempts to disqualify opposing counsel on ethical grounds, focusing on preserving the integrity of the trial process. *Id.* at 444. The decision permitted a law firm (smaller than the Epstein Firm) employing a former government attorney, who had high-level supervisory responsibility while at the Securities and Exchange Commission ("SEC"), to continue to represent the receiver for a corporation against which the SEC had actually commenced an action while that attorney was employed by the SEC and in fact directly involved in the investigation culminating in the filing of the action. The Court of Appeals affirmed the District Court ruling that disqualification of the law firm was not warranted because the attorney, albeit a principal in the law firm, was effectively screened from all participation in the case. No threat of taint to the underlying trial was found. *Id.* at 445. The restrained approach taken by the Court of Appeals was designed to avoid "unnecessary and unseemly delay" and

reinforce "public confidence in the fairness of the judicial process." *Id.* at 446.

In stark contrast to the rationale of *Armstrong* set out two months earlier, the panel decision of the Court of Appeals in this case reverted to a strict and prophylactic application of the ABA Code of Professional Responsibility. Thus, despite the explicit attempt by the *Armstrong en banc* decision to clarify the "standard to be applied by the trial judge" in ruling upon disqualification motions, *Id.* at 434, the Court of Appeals in this case served only to leave the law of the Second Circuit on attorney disqualifications in a muddled state. This conflict should be resolved, as the district courts are time and time again called upon to rule upon disqualification motions based on ethical grounds.

III.

The Court of Appeals Decision Conflicts With the Decision of the Third Circuit in *P. Stone, Inc.* v. *Koppers Corp.* on the Issue of Whether to Reach the Merits of an Immediate Appeal of an Order Denying a Disqualification Motion.

Despite the *Armstrong* ruling that orders denying motions for disqualification would no longer be immediately appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), two months later the Court of Appeals for the Second Circuit in this case entertained such an appeal, grounding the decision on a theory of "judicial economy." This decision squarely conflicts with the subsequent holding of the Court of Appeals for the Third Circuit in *P. Stone, Inc.* v. *Koppers Corp.*, No. 80-1111 (3d Cir. October 7, 1980) (per curiam). There the court refused to entertain the immediate appeal

of an order denying a motion to disqualify counsel and simply dismissed the appeal for want of jurisdiction. This conflict between the Courts of Appeals for the Second and Third Circuits presents another ground for review of this case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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December, 1980

APPENDIX

APPENDIX A

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1199—September Term, 1979

(Argued May 19, 1980 Decided August 26, 1980)

Docket No. 80-7254

JAMES K. J. CHENG,

Plaintiff-Appellant,

v.

GAF CORPORATION,

Defendant-Appellee.

Before:

OAKES and MESKILL, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from an order entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge,* denying plaintiff's motion to disqualify defendant's law firm.

Reversed and remanded.

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* Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

JONATHAN A. WEISS, Legal Services for the Elderly Poor, New York, New York (Kathleen L. Coles, Legal Services for the Elderly Poor, New York, New York, of counsel), *for Plaintiff-Appellant.*

ROBERT L. JAUVTIS, New York, New York (Epstein Becker Borsody & Green, New York, New York, of counsel), *for Defendant-Appellee.*

MESKILL, *Circuit Judge:*

James K. J. Cheng appeals from an order entered in the United States District Court for the Southern District of New York (Owen, *J.*) denying his motion to disqualify the law firm representing his opponent, GAF Corporation. Cheng argued below that because one of the attorneys employed by the law firm representing GAF previously had been employed by the legal services office representing Cheng, disqualification was necessary to avoid violations of various Canons of the American Bar Association Code of Professional Responsibility ("ABA Code"). The district court, concluding that disqualification was not warranted, denied Cheng's motion. For the reasons set forth below, we reverse the district court's decision and remand for entry of an order of disqualification.

BACKGROUND

In 1977, Cheng, represented by Legal Services for the Elderly Poor ("LSEP"), instituted an employment discrimination action against GAF. From the start, GAF has been represented in this litigation by the law firm of Epstein, Becker, Borsody & Green ("Epstein firm"). In October, 1979, while the *Cheng* case was still in the dis-

covery phase, the Epstein firm hired Philip Gassel as an associate in its health law department. From 1974 until his association with the Epstein firm, Gassel had been employed as a senior attorney at LSEP. Although Cheng concedes that while Gassel was employed at LSEP he did not represent Cheng in any litigation, Cheng claims that Gassel did participate in discussions with other members of the staff about the GAF case.

After learning of Gassel's new association, Cheng filed a motion to disqualify the Epstein firm from representing GAF in the instant case. Cheng alleged that the "continued participation of the Epstein firm . . . seriously jeopardizes the integrity of confidences and secrets of [Cheng] which were imparted to Mr. Gassel under the cloak of attorney-client relationship." Weiss Affidavit at 5. Citing the small size of the LSEP legal staff, which consisted of four to six attorneys working with several part-time students, and noting the frequency of cooperation and consultation among the LSEP attorneys, Cheng claimed that Gassel had actual knowledge of Cheng's confidences and secrets when he joined the Epstein firm. Cheng argued, therefore, that under Canons Four, Five and Nine of the ABA Code,[1] the Epstein firm should be disqualified.

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[1] The ABA Code consists of Canons which are "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." While the Ethical Considerations accompanying each Canon are "aspirational in character," the Disciplinary Rules keyed to each Canon "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Preliminary Statement, American Bar Association Code of Professional Responsibility.

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client" and Canon 9 warns that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Opposing the disqualification motion, the Epstein firm averred in its affidavits that Gassel had been hired as a health law attorney and had functioned only in that capacity, aside from handling some commercial litigation and miscellaneous matters. The Epstein firm emphasized that Gassel had not worked on the *Cheng* case, had not divulged any confidential information and would not be required to do so in the future. Gassel submitted an affidavit disclaiming any present involvement in the *Cheng* case and urging acceptance of the technique of insulation practiced by the Epstein firm.

In his opinion denying the disqualification motion, Judge Owen discussed Gassel's involvement in the *Cheng* case, and expressed the belief that Gassel possessed minimal confidential information, that he had not disclosed the information yet and that the Epstein firm had effectively screened him from the attorneys handling GAF's defense. Stating that the prejudice that would result from requiring GAF to change law firms after extensive discovery and trial preparation would be substantial, Judge Owen concluded that "to order disqualification under these circumstances would not serve any interest which the law recognizes." Because we disagree with Judge Owen's view of the effectiveness of the screening procedures employed by the Epstein firm, we reverse.[2]

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[2] After the filing of our decision in *Armstrong* v. *McAlpin*, slip op. 3693 (2d Cir. June 20, 1980) (en banc), the Epstein firm submitted a letter brief urging us to dismiss Cheng's appeal. In *Armstrong*, we held that *"henceforth* orders denying disqualification motions will not be appealable." Slip op. at 3697 (emphasis added). We do not regard that language as precluding us from reaching the merits of the instant appeal.

Some of the considerations which prompted us to reach the merits in the *Armstrong* case counsel us to do so in the instant appeal. *See Armstrong*, slip op. at 3711-13. Since this appeal was filed,

Appendix A

Discussion

It is well settled in this Circuit that a motion to disqualify an attorney is addressed to the discretion of the district court, and a ruling thereon will not be overturned absent a determination of abuse of discretion. *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). *See also Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *Allegaert* v. *Perot*, 565 F.2d 246 (2d Cir. 1977); *W. T. Grant Co.* v. *Haines*, 531 F.2d 671 (2d Cir. 1976). The question raised in this appeal is whether Judge Owen's refusal to disqualify the Epstein firm was such an abuse.

I. *Disqualification Under Canon 4*

The American Bar Association Code of Professional Responsibility has been recognized in this Circuit as providing appropriate guidelines for proper professional behavior. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co., supra*, 567 F.2d at 227 n.2; *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 129 n.2 (2d Cir. 1976); *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976); *Hull* v. *Celanese Corp., supra*, 513 F.2d at 571 n.12 *Cf. Arm-*

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briefed, argued, and considered prior to the filing of the *Armstrong* decision, our disposition of the appeal on the merits will neither crowd the appellate docket nor delay the litigation below. On the other hand, for us to dismiss the appeal at this stage would entail a needless waste of both judicial and private resources. Cheng's appeal was filed in full compliance and proper reliance on the pre-*Armstrong* law of this Circuit. The evils the *Armstrong* decision is intended to avoid have already occurred in the instant case and cannot be undone by dismissal at this stage of the proceedings. Consequently, we can see no justification for wasting the time and resources of the parties, the trial court and this Court by requiring Cheng to re-appeal at a later date. Nor do we view *Armstrong* as intending such a result.

strong v. *McAlpin,* slip op. 3693, 3723 n.26 (2d Cir. June 20, 1980) (although ABA committee that drafted Code has indicated rules were intended for use in disciplinary proceedings rather than in disqualification proceedings, Court refers to Code for guidance).

Canon 4 and its Ethical Considerations and Disciplinary Rules provide standards to guide an attorney in preserving the confidences and secrets of a client.[3] Cheng argues vigor-

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[3] *See* Canon 4, quoted in note 1, *supra.* The only Disciplinary Rule keyed to Canon 4 provides:

> DR 4-101 Preservation of Confidences and Secrets of a Client.
>
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or acquired by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his em-

ously that under these standards Gassel should be disqualified from representing GAF in the present action. Although Gassel is not actively involved in GAF's defense, his disqualification under Canon 4 would implicate the sweeping prohibition of representation by a tainted attorney's co-workers contained in Canon 5. Disciplinary Rule 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." Although the district court below did not decide whether Gassel himself had to be disqualified under Canon 4, we must address this question briefly as it bears upon our analysis of Disciplinary Rule 5-105(D).

Determination of a violation of Canon 4 sufficient to disqualify an attorney traditionally has been based on a finding of concurrent or successive representation in the same or substantially related matters.

> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences

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ployees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

were disclosed to the attorney bearing on the subject matter of the representation.

T. C. Theatre Corp. v. *Warner Bros. Pictures,* 113 F. Supp. 265, 268 (S.D.N.Y. 1953). It is well established that a court may not inquire into the nature of the confidences alleged to have been revealed to the tainted attorney. To require proof of access to privileged information would "put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." *Government of India* v. *Cook Industries, Inc.,* 569 F.2d 737, 740 (2d Cir. 1978). *See also Funds of Funds, Ltd.* v. *Arthur Andersen & Co., supra,* 567 F.2d at 235-36; *United States* v. *Standard Oil Co.,* 136 F. Supp. 345, 354 (S.D.N.Y. 1955) (Kaufman, *J.*) ("complaint need only show *access* to such *substantially related* material and the inference that defendant received these confidences will follow.") (emphasis in original). In the instant case, there is no dispute that the matters involved in Gassel's former association with Cheng are substantially related to his present association; the suit and the parties have remained the same throughout the proceedings. The only changing factor has been Gassel, who has moved from the plaintiff's firm to the defendant's firm, thus becoming subject to a disqualification challenge.[4]

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[4] In our recent decision in *Armstrong, supra,* we noted that "with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, . . . or more commonly (2) *where the attorney is at least potentially in a position to use privileged information concerning the other*

Appendix A

In *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (overruled on other grounds in *Armstrong* v. *McAlpin, supra*), we recognized that although there may be an inference that an attorney has knowledge of the confidences and secrets of his firm's clients, that inference is rebuttable. We also noted an earlier caution that the standard of proof to rebut this presumption should not become "unattainably high." *Id.* at 754, *quoting Laskey Bros. of W.Va., Inc.* v. *Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). *See also Government of India* v. *Cook Industries, Inc., supra*, 569 F.2d at 741 (Mansfield, *J.*, concurring). After considering the affidavits submitted by all parties in the instant case, including Gassel, Judge Owen assumed for the purposes of the motion that Gassel had been privy to some confidential disclosures, but he admitted that the extent of Gassel's exposure to the *Cheng* case through informal discussions or general strategy conferences had not been conclusively determined. Thus, the district court refrained from deciding whether Gassel had rebutted the presumption that he had obtained impermissible knowledge of Cheng's confidences and secrets. If we accept Judge Owen's assumption that Gassel was privy to those confidences, however, it is clear that Gassel would have to be disqualified under Canon 4 from representing

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side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage . . . ."

Slip op. at 3718-19, *quoting Board of Education* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (footnote and citations omitted) (emphasis added). In the instant case, because the Epstein firm is defending the still pending suit brought on Cheng's behalf by LSEP, Gassel is potentially in a position to use Cheng's confidential information to Cheng's disadvantage.

Cheng's adversary in the identical proceedings.[5] *Government of India* v. *Cook Industries, Inc., supra,* 569 F.2d 737; *Fund of Funds, Ltd.* v. *Arthur Andersen & Co., supra,* 567 F.2d at 225; *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562 (2d Cir. 1973).

Applying Disciplinary Rule 5-105(D), it appears that the Epstein firm should be disqualified as well. Judge Owen did not reach this conclusion, choosing instead to find that regardless of the extent of Gassel's knowledge, Cheng was adequately protected because Gassel had not yet divulged any confidences and was not inclined to do so in the future. We have considered the affidavits submitted to the district court and we conclude that there is ample support for Judge Owen's assumption that Gassel had been privy to Cheng's confidences, thus we find that under Canon 4 he would be disqualified from representing the defendant in the *Cheng* case. We next address Canon 5 and the screening procedures instituted to avoid disqualification of the Epstein firm.

II. *The "Chinese Wall" Defense*

Anticipating difficulties caused by a strict application of Disciplinary Rule 5-105(D), law firms have employed

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[5] The following allegations appeared in the affidavits submitted on Cheng's behalf: Gassel was personally introduced to Cheng; he "was present at and participated in several discussions with other LSEP attorneys and law students regarding the conduct, strategy, and facts of Mr. Cheng's case"; he discussed Cheng's communications with the representing attorney. Weiss affidavit at 4. These allegations were not challenged or refuted in any of the Epstein firm's affidavits; indeed, they appear also in the Epstein firm's brief on appeal. GAF brief at 3. It appears from the stipulated record on appeal that no additional evidence was before Judge Owen. Because we find that the affidavits demonstrate that Gassel did have knowledge of Cheng's confidences and secrets, we accept Judge Owen's assumption for purposes of this appeal.

various methods of screening a possibly tainted attorney from the rest of the firm's involvement in a particular case. The Epstein firm in the instant case cites the division of duties within its firm to demonstrate the height and thickness of the "Chinese Wall" they have constructed between Gassel and the *Cheng* case. They note in their affidavits that Gassel has been assigned to the health law division of their firm while GAF's defense is being handled by its labor division. The affidavits also aver that Gassel has not worked on the *Cheng* case, disclosed Cheng's confidences nor discussed the merits of the case while at the Epstein firm, and that the firm will not permit him to have any substantive involvement in the *Cheng* defense. Judge Owen accepted the Epstein firm's position, finding that the "risk of disclosure of confidential information is negligible." We take a different view of the potential for disclosure, keeping in mind that, as Judge Owen noted, one of the purposes of disqualification is "to guard against the danger of inadvertent use of confidential information," *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp., supra,* 518 F.2d at 754, *quoting Ceramco, Inc.* v. *Lee Pharmaceuticals,* 510 F.2d 268, 271 (2d Cir. 1975).

Although Gassel may not be personally involved in the *Cheng* defense, he is a member of a relatively small firm.[6] The matter involved in his prior exposure to Cheng while at LSEP is still being actively pursued by attorneys for GAF at the Epstein firm. Despite the Epstein firm's protestations, it is unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this

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[6] The Epstein firm's affidavit states that a total of 35 attorneys are employed in their New York and Washington, D.C. offices, with approximately 60 percent of the total located in the New York office where Gassel is an associate. Becker affidavit at 1.

representation. Unlike many disqualification motions that appear before this Court, here there exists a continuing danger that Gassel may unintentionally transmit information he gained through his prior association with Cheng during his day-to-day contact with defense counsel. *Compare NCK Organization, Ltd.* v. *Bregman, supra,* 542 F.2d 128, and *Hull* v. *Celanese Corp., supra,* 513 F.2d 568. *See also Government of India* v. *Cook Industries, Inc., supra,* 569 F.2d 737. If after considering all of the precautions taken by the Epstein firm this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect Cheng or members of the public to consider the attempted quarantine to be impenetrable. Although we do not question Mr. Gassel's integrity or his sincere efforts to disassociate himself from the *Cheng* case, we are not satisfied that under the facts of this case the screening will be effective, thus we look to Disciplinary Rule 5-105(D) and order the district court to disqualify the Epstein firm.[7]

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[7] Although the Epstein firm urges that the result in this case should be controlled by our recent decision in *Armstrong, supra,* we find many factors distinguishing the two situations. In *Armstrong,* a former government attorney was concededly disqualified from private employment in a matter in which he had had substantial responsibility while employed by the Securities and Exchange Commission. This Court held that the attorney's law firm could continue representation where the tainted attorney was screened effectively.

In the instant case the tainted attorney is disqualified under Canon 4's commendable intent to protect a client's confidences and secrets, while in *Armstrong,* the attorney was disqualified under Disciplinary Rule 9-101(B), which forbids a lawyer to accept private employment in a matter in which he had substantial responsibility while a public employee. In *Armstrong* we noted the absence of a threat of taint of the underlying trial, and cited several policy reasons for approving the screening employed there. Primary among these reasons was a recognition that to disallow screening in all cases involving government attorneys might ham-

See Cinema 5, Ltd. v. *Cinerama, Inc., supra,* 528 F.2d at 1387, and cases cited therein. *See also Fund of Funds, Ltd.* v. *Arthur Andersen & Co., supra,* 567 F.2d at 229 n.10.

III. *Appearance of Impropriety*

Although we rest our holding on the clear direction in Disciplinary Rule 5-105(D), the result is compelled also by Canon 9's warning that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." In *Armstrong* v. *McAlpin, supra,* slip op. 3693, we cited the restrained approach to disqualification that had been adopted in *Board of Education* v. *Nyquist, supra,* 590 F.2d 1241, noting that where there is no danger that the underlying trial will be tainted, appearances of impropriety alone are insufficient to justify disqualification. Judge Owen, in his opinion below, also cited *Nyquist's* recommendation of restraint and concluded that it was "virtually assured" that the underlying trial in *Cheng* would not be tainted. We disagree. Such assurances would not seem to be possible in a situation such as this where Gassel is "potentially in

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per the "government's efforts to hire qualified attorneys." Slip op. at 3716. In the instant case, by contrast, there *does* exist a threat of taint of the underlying trial, but there are no public policy reasons against disqualification as compelling as those involved in *Armstrong.* In addition, the tainted attorney's former employer in *Armstrong* agreed to the representation as long as proper screening techniques were used; here, Cheng and LSEP, Gassel's former employer, have objected to the representation since the Epstein firm hired Gassel. Finally, although the prejudice to the client separated from his attorney is also a factor, we must note that the prejudice to GAF caused by changing firms at this point is much less than the hardship that would have resulted from disqualification in *Armstrong.* "[S]eparating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart his attempt to obtain redress for defendants' alleged frauds." *Id.* at 3722.

a position to use privileged information," *Nyquist,* 590 F.2d at 1246, which he gained through his prior contact with the *Cheng* case. It is possible that, despite attempts by the Epstein firm to screen Gassel, the underlying trial could be tainted through GAF's inadvertent use of the unfair advantage it has over Cheng. This case presents, therefore, both the danger of tainting the underlying trial and the unacceptable appearance of impropriety condemned in Canon 9. *Cf. Emle Industries, Inc.* v. *Patentex, Inc., supra,* 478 F.2d at 565 (where public confidence in Bar would be undermined, "even an appearance of impropriety requires prompt remedial action by the court.").

Thus, it is clear that under Canon 9 as well as Canons 4 and 5, Gassel and the Epstein firm must be disqualified. Judge Owen's decision to the contrary was an abuse of discretion. Moreover, if there were any doubt as to the propriety of our action, we would resolve it in favor of disqualification. *Hull* v. *Celanese Corp., supra,* 513 F.2d at 571; *accord, Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp., supra,* 518 F.2d at 757.

The order of the district court is reversed and the case is remanded for entry of an order of disqualification.

APPENDIX B

Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3159

JAMES K.J. CHENG,

Plaintiff,

—against—

GAF CORPORATION,

Defendant.

MEMORANDUM AND ORDER

OWEN, District Judge

James K.J. Cheng moves to disqualify the law firm of Epstein Becker Borsody & Green (the "Epstein firm"), attorneys for defendant GAF Corporation, from further participation in the instant action. This suit has been actively prosecuted and defended since its commencement in 1977. The complaint alleges discrimination against the plaintiff in the course of his employment because of his Chinese ancestry.

This disqualification motion is based upon the following facts. The plaintiff is represented by Legal Services for the Elderly Poor ("LSEP") at 2095 Broadway, New York City. Between October 1974 and October 1979, Philip Gassel, Esq. was employed as one of the half-a-dozen attorneys at LSEP. In October 1979, Mr. Gassel was hired to work

exclusively in the Epstein firm's health law department with the express understanding that he would not be involved in the GAF litigation which was being handled by another department. Prior to hiring Gassel, the Epstein firm discussed with him the fact that LSEP was representing the plaintiff in this action.[1] Gassel agreed that he would not discuss the *Cheng* case with anyone at the Epstein firm. Plaintiff does not even suggest that Mr. Gassel has communicated or intends to communicate any confidential information to the Epstein firm with regard to this case.[2] In fact, LSEP's moving affidavit states that "his integrity is above suspicion. . . ."[3]

Even assuming that Mr. Gassel is possessed of some confidential information, under all the circumstances, I conclude that disqualification of the Epstein firm from this case is neither warranted nor appropriate. The purpose of disqualification is to satisfy "'the need to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information.'" *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.*,

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[1] Plaintiff admits that Mr. Gassel never worked directly on the *Cheng* case while at LSEP. Questions remain, however, as to the extent, if any, of Mr. Gassel's exposure to the *Cheng* case through informal discussions or general strategy conferences with attorneys at the small LSEP office. For purposes of this motion, I will assume that Mr. Gassel has been privy to some of the plaintiff's confidences within the meaning of Canon 4 of the American Bar Association Code of Professional Responsibility.

[2] Obviously, the Epstein firm has conferred with Mr. Gassel in preparation of papers submitted in opposition to this motion, which include an affidavit from Mr. Gassel himself.

[3] It is noteworthy that the supplemental affidavit of LSEP, submitted after argument with leave of the court, refers to communications *to* Gassel, but does not recite any communications *from* Gassel.

518 F.2d 751, 754 (2d Cir. 1975), *quoting, Ceramco, Inc.* v. *Lee Pharmaceuticals,* 510 F.2d 268, 271 (2d Cir. 1975). Whether to grant or deny a motion to disqualify is clearly discretionary. *Hull* v. *Celanese Corporation,* 513 F.2d 568, 571 (2d Cir. 1975). In reaching a decision on this issue, the court should weigh "the needs of efficient judicial administration against the potential advantage of immediate preventive measures. . . ." *Board of Education* v. *Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979). Furthermore, where, as here, it is virtually assured that an attorney's conduct will not taint the underlying trial, the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order. . . ." *Id.* at 1247.

In this case, the risk of disclosure of confidential information is negligible. It is clear that (a) Mr. Gassel's possession of confidential information about the *Cheng* case is at best minimal; (b) even assuming that he possesses confidential information, he has not disclosed it to the Epstein firm; and (c) Mr. Gassel is not disposed to dishonor his obligations under the ABA Code of Professional Responsibility.[4]

On the other hand, the prejudice to defendant of disqualification of the Epstein firm is certain to be substantial. The action is far along in terms of discovery and trial preparation, and a change of lawyers at this stage would be very costly for defendant. Furthermore, apart from the delay and expense of disqualification, it would have "an

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[4] By supplemental affidavit, plaintiff's counsel informed the court that Mr. Cheng is concerned and upset over the fact that Mr. Gassel is now working for the Epstein firm. Nevertheless, these sentiments cannot be a controlling factor in the court's decision whether to disqualify the Epstein firm. This is especially true where there is no showing that any of Mr. Cheng's confidences have been or are about to be disclosed.

immediate adverse effect on the client by separating him from counsel of his choice, ..." *Id.* at 1246. I conclude, therefore, that to order disqualification under these circumstances would not serve any interest which the law recognizes.[5]

The motion is accordingly denied.

So ordered.

March 14, 1980.

/s/ Richard Owen
United States District Judge

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[5] The trend of thinking in this area seems to disfavor automatic disqualification. *See* ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct at 110 (Discussion Draft, Jan. 30, 1980).

> For example, if the positions of two clients are opposed in litigation, a lawyer who substantially assisted in preparing one client's case could not thereafter participate in representing the opposing party. *However, that would not preclude representation of the opposing party by the firm with which the lawyer had become associated if the lawyer had no involvement in the representation and if no risk of disclosing confidences was involved.* (Italics supplied.)

APPENDIX C

Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

80-7254

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and eighty.

Present:

HON. JAMES L. OAKES,
HON. THOMAS J. MESKILL,
Circuit Judges

HON. DUDLEY B. BONSAL,
District Judge

JAMES K. J. CHENG,
Plaintiff-Appellant,

v.

GAF CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro
Clerk

By: /s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

United States Court of Appeals
Filed
Aug. 26, 1980
A. DANIEL FUSARO, CLERK
Second Circuit

APPENDIX D

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

80-7254

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of October, one thousand nine hundred and eighty.

JAMES K. J. CHENG,

Plaintiff-Appellant,

v.

GAF CORPORATION,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix D

A poll of the active judges having been taken on the suggestion for rehearing in banc, and there being no majority in favor thereof, rehearing in banc is DENIED.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
Filed
Oct. 27, 1980
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT